

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
Implementation of Section 621(a)(1) of)	
the Cable Communications Policy Act of 1984)	MB Docket No. 05-311
as amended by the Cable Television Consumer)	
Protection and Competition Act of 1992)	

COMMENTS OF THE CITY OF CAPE CORAL, FLORIDA

These Comments are filed by the City of Cape Coral, Florida (hereinafter referred to as the “City”) in response to the Federal Communications Commission’s (hereinafter “FCC” or “Commission”) Notice of Proposed Rulemaking (“Cable Franchising NPRM” or “NPRM”).¹ The NPRM specifically addresses the implementation of Section 621(a)(1) of the Communications Act of 1992, which provides that “A franchising authority...may not unreasonably refuse to award an additional competitive franchise.”² The City of Cape Coral has not unreasonably refused to award additional competitive cable franchises. In fact, the City has encouraged and sought additional competitive cable providers, since competition promotes low cable rates and because competition enhances customer service among competitors.

It is the City’s position that local governments are the most qualified entities to ensure the proper issuance of cable franchises for new entrants into the video services field on a timely basis, while ensuring the achievement of Congressionally-stated policy goals, including responsiveness to local community needs. In support of this position, the City would like to inform the Commission about the recent history of cable television franchising in the City’s jurisdiction, and to respond to certain positions taken and questions posed by the Commission in its NPRM.

Introduction

The local cable franchising process promotes competition by giving equitable opportunities to *all providers* who want to use the rights of way to provide video service. Creating an exception for telephone companies that want to offer video service, by exempting them from requiring a franchise agreement, creates an unnecessary competitive advantage for

¹ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992*, MB Docket No. 05-189, Notice of Proposed Rulemaking (released November 18, 2005).

² See 47 U.S.C. §541(a)(1).

these companies. Local cable franchising ensures that providers are permitted access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner which is in accordance with local requirements. Local cable franchising also ensures that the City's local community's specific needs are met and that local customers are protected. Without the franchising process, the City would be unable to provide this important supervisory function.

Congress did not intend for the Commission to preempt or supersede local government's franchising authority. Congress delegated specific powers to local franchising authorities which are not anti-competitive as some new entrants assert. The Cable Act acknowledges that municipalities are best able to determine a community's cable-related needs and interests. Accordingly, it would not be appropriate for the Commission to question the City in its identification of such needs and interests. The House Report states:

It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. However, if that process is to further the purposes of this legislation, the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform Federal standards that are not continually altered by Federal, state or local regulation.³

Furthermore, in *Union CATV v. City of Sturgis*, the Court concluded that, "judicial review of a municipality's identification of its cable-related needs and interests is very limited. A court should defer to the franchising authority's identification of the community's needs and interests..."⁴ There is no reason in fact or law supporting the Commission's implementation of a different standard from that of the court. Thus, franchising should remain at the local level and any unreasonable denials should be reviewed by the judiciary.

The City has an interest and the right, delegated by Congress to prevent economic redlining, to establish and enforce customer service standards and to ensure the provision of adequate public, educational and governmental access channel capacity, facilities or financial support. Furthermore, for the minority of communities that may abuse their authority, the solution is not to undermine the entire franchising process. There is no need to create a new Federal bureaucracy in Washington to handle matters of specifically local interest.⁵

3 See H.R. REP. NO. 98-934, at 24, *reprinted in* 1984 U.S.C.C.A.N. at 4661.

4 See *Union CATV v. City of Sturgis*, 1997 FED App. 0075P (6th Cir.).

5 The City's franchising process ensures that customer service complaints, in most cases are handled within 24 hours or at the most, within 72 hours. The City has a rapport with the cable operator to ensure that issues are resolved. This type of relationship is a direct result of the local franchising process. It is inconceivable that a state or federally held franchise with dispute resolution maintained at the state or federal level is going to be comparable to the current service standards in the City. Finally, the Commission does not have the staff, budget or resources for handling complaints in such a timely manner.

The Franchising Process

Initial Franchise

Cable service cannot be provided unless there is a cable franchise granted by the franchising authority.⁶ “Franchise” means the “right granted by the City to a Franchisee in a franchise agreement to construct, maintain and operate a cable system under, on, and over Streets, roads and any other public ways, rights-of-ways, or easements within the City.”⁷ The City is empowered by the cable television regulations of Title 47 of the United States Code to act as a Local Franchising Authority (LFA) with all of the powers and authority that status provides, including but not limited to negotiating and granting cable television franchises.

The public policy is that cable television regulations should include franchise procedures and standards which encourage the growth and development of cable systems and assure that cable systems are responsive to the needs and interests of the local community; and should promote competition in cable communications and minimize unnecessary regulation of cable systems.⁸ Accordingly, an LFA may not unreasonably refuse to award a competitive cable television franchise.⁹

A cable franchise functions as a contract between the local government, operating as the local franchising authority, and the cable operator. Like other contracts, its terms are reasonably negotiated. Under the Federal Cable Act it is the statutory obligation of the local government to determine the community's cable-related needs and interests and to ensure that these are addressed in the franchising process. However derived, whether requested by the local government or offered by the cable operator, once the franchise is approved by both parties the provisions in the franchise agreement function as contractual obligations upon both parties.

The City is authorized to regulate the construction, installation, operation and maintenance of Cable Television Systems pursuant to federal, state and local law. The City's franchise provides that changes in law which affect the rights or responsibilities of either party under the Franchise agreement will be subject to and shall be governed by the Communications Act, and any other applicable provision of federal, state or local law.

Public Hearing

Local government officials encourage competition and new technologies since competing technologies and companies result in tangible benefits to the City and its residents. Public hearings provide an opportunity for residents, government officials and providers to voice their interests and concerns.

⁶ See 47 U.S.C. §541(d).

⁷ See City of Cape Coral Code of Ordinances Chapter 15, Article I (“Cable Ordinance”).

⁸ See 47 U.S.C. § 521.

⁹ See 47 U.S.C. § 541(a)(1).

Florida law requires that no local government may grant a cable franchise unless it does so after holding a public hearing in which it considers the economic impact upon private property, the public need for the franchise, the capacity of the public rights of way to accommodate the system, the present and future use of the public rights of way to be used by the cable system, the potential disruption to existing users of the rights of way, the financial ability of the franchise applicant to perform, societal interests generally considered in cable television franchising, and any other substantive or procedural matters which may be relevant to consider.¹⁰

While a franchise is negotiated by the local government as a contract, the process provides the cable operator additional due process rights, and consequently additional obligations on the local government. The City of Cape Coral exercises its cable franchising authority pursuant to Ordinance No. 90-00. Franchises are granted pursuant to the Ordinance after a duly noticed public hearing. Specifically Ordinance No. 90-00 provides:

The City shall hold a public hearing to consider an application or applications. The City shall not consider an application for a franchise unless and until applicant has submitted a proposed Franchise Agreement which it is prepared to execute. The applicant(s) shall be notified of the hearing and shall be given an opportunity to be heard. Based upon the application(s), the testimony presented at the public hearing, any recommendations of the City or staff, and any other information relevant to the application(s), and the terms and conditions contained in the proposed franchise agreement, the City shall decide by resolution whether to approve or deny the proposed franchise agreement(s), and thereby grant or deny a franchise. The City may make the grant of a franchise conditioned upon the completion of construction within a reasonably prescribed time or upon the performance of other specific obligations which are to be set forth in the franchise agreement, specifying that failure to comply with the condition will cause the franchise to become null and void.¹¹

Local Franchising/Local Oversight

If telephone providers, such as SBC, AT&T and Verizon are permitted to offer cable service without first obtaining a cable franchise from an LFA, these providers will be exempt from local oversight and will be less accountable to the local communities in which they operate than the cable systems with which they will be competing. This would be competitively unfair and harmful to local communities and their residents who would lose the ability to manage the rights of way. Such local oversight provides important consumer and public protections.

The City is the most familiar with the local needs of its residents. Establishing and ensuring compliance with local building and zoning codes, and public safety regulations are performed at a local level. For example, the City's Cable Ordinance provides,

¹⁰ See Fla. Stat. § 166.046(2).

¹¹ See City of Cape Coral Code of Ordinances Chapter 15, Article I ("Cable Ordinance").

Except to the extent required by law, a Franchisee shall, at its expense, protect, support, temporarily disconnect, relocate, or remove, any of its property when required by the City by reason of traffic conditions, public safety, Street construction, Street resurfacing or widening, change of Street grade, installation of sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of municipal or public utility improvements; provided, however, that the Franchisee shall, in all such cases, have the privilege of abandoning any property in place. Franchisee shall do so at its expense to the extent other users of the rights-of-way are so responsible, consistent with applicable law.¹²

Accordingly, the Commission cannot bypass the City's franchising process by considering establishing rules applicable only to telephone companies seeking to use the City's rights of way to offer a video product. The effect of these rules would be to usurp the statutory process established by Congress for cable franchise renewals to ensure that local needs are met.

Florida's Level Playing Field Statute

The public policy of the State of Florida is that cable television LFAs should grant overlapping franchises under terms and conditions which are not more favorable or less burdensome than those of other franchises.¹³ Furthermore, section 166.046(5) provides "Nothing in this section shall be construed to prevent any...city considering the approval of an additional cable service franchise in all or any part of the area of such...city from imposing additional terms and conditions upon the granting of such franchise as such...city shall in its sole discretion deem necessary or appropriate."

Cable Franchising in the City of Cape Coral, Florida

Community Information

The City of Cape Coral has a population of approximately 150,000 people. The City's franchised cable provider is Florida Cablevision Management Corp., a wholly owned subsidiary of Time Warner Cable ("Time Warner"). On October 31, 2005, the City consented to the assignment and transfer of the Time Warner Franchise to a wholly owned subsidiary of Comcast. Cable franchises in the City are governed by Ordinance.

Competitive Cable Systems

The City is not served by any competitive systems nor has the City received any applications from potential competitors. The non-existence of any competition is not a result of any action or inaction by the City. In fact, the policy of the City as set forth in the Ordinance expressly states that "it is the intent of the City and the purpose of the Ordinance to promote competitive cable rates and services and to encourage the provision of a diversity of information sources to City residents, businesses, the community, the City and other public institutions by

¹² See City of Cape Coral Code of Ordinances Chapter 15, Article I ("Cable Ordinance").

¹³ See Fla. Stat. § 166.046(3).

cable technology.” Furthermore, consistent with applicable federal and state law, the City’s Ordinance expressly prohibits the grant of exclusive franchises. Thus, the lack of competitive franchises in the City of Cape Coral is due simply to a lack of interest by any other provider and is not due to the City’s local franchising authority or their abuse thereof.

Cape Coral’s Current Franchise

The City granted an early renewal to Time Warner on September 11, 2000, for a term of fifteen (15) years plus thirty six (36) months representing the unexpired term of the pre-existing franchise. The City was in a position to expedite the renewal to negotiate with the cable operator to obtain benefits and services for the City and subscribers which it would otherwise not have been able to achieve. As a result, at this time the City is not currently negotiating a franchise renewal with the incumbent provider.

Customer Service

Because service issues are local, customer service must be handled at the local level. These complaints are made and addressed within the community. There are thousands of customer service complaints across the country, which are addressed at the local level. The State or the Commission is simply not equipped with handling the sheer number of these customer service complaints.

The City’s Franchise provides that the Franchisee agrees to comply with and to implement and maintain any practices and procedures that may be required to monitor compliance with customer service requirements set forth in the City’s Cable Television Ordinance which applies to all cable operators. The franchise requires compliance with Section 15-18 of the City’s Cable Ordinance which sets forth specific obligations and fines in the event of non-compliance. The Ordinance requires specific information relating to the Franchisee’s “full schedule and description of services, service hours and location of the customer service office of the Franchisee or offices available to Subscribers, and a schedule of all rates, fees and charges for all Cable Services provided over the Cable System.”¹⁴ Below are a few customer service obligations which help the City ensure that the cable operator is treating the residents in accordance with federal standards and the terms agreed to in its Franchise.

- The Franchisee shall maintain all parts of its Cable System in good condition and in accordance with standards generally observed by the cable television industry
- Franchisee shall maintain a publicly-listed local, toll-free telephone number and employ a sufficient number of telephone lines, personnel and answering equipment or service to allow reasonable access by Subscribers and members of the public to contact the Franchisee on a full-time basis
- Franchisee shall respond to service interruptions promptly and in no event later than twenty-four (24) hours after the interruption becomes known to Franchisee. Other

¹⁴ See The City of Cape Coral Cable Television Ordinance, codified at Chapter 78, Article IX of the City Code of Ordinances (“Cable Ordinance”).

service problems shall be responded to promptly and in no event later than the next business day after the problem becomes known to the Franchisee

- Franchisee shall develop written procedures for the investigation and resolution of all Subscriber or City resident complaints that are received by the City. Such procedures shall be submitted to the City Administrator or designee. A Subscriber or City resident who has not been satisfied by following the Franchisee's procedures may file a written complaint with the City Administrator or designee who will investigate the matter and in consultation with the Franchisee, as appropriate, attempt to resolve the matter.

The Ordinance also provides enforcement remedies where customer service requirements are not met. For example, a single fine violation ranges from \$100 - \$350 per violation.

The City shall consider any justification or mitigating factor advanced in the written response of the Franchisee, including but not limited to rebates or credits to the Subscriber or a cure of the violation. The City may not assess any fine if the Franchisee has reasonably resolved the complaint or cured the violation within a reasonable time frame.

Subsequent to the notice of proposed fine to Franchisee, and consideration of the response of the Franchisee, if any, the City may, after a public hearing at which Franchisee shall have an opportunity to be heard, issue an assessment of fine. The fine shall be paid within thirty (30) days of written notice to the Franchisee or, if Franchisee challenges the assessment in a court of competent jurisdiction, within thirty (30) days of a final non-appealable decision that the assessment is valid. If said refund, credit or fine is not paid by Franchisee within such thirty (30) day period, as the case may be, the City may, at its discretion, withdraw immediately the amount thereof from the Security Fund. Upon such withdrawal, the City shall notify Franchisee of the withdrawal amount, after which Franchisee shall have ten (10) days from the date of such notice to deposit in the Security Fund an amount sufficient to restore the Security Fund to the amount specified in the Franchise Agreement. This fine shall constitute liquidated damages to the City for the violation and the City may enforce payment of the fine in any court having jurisdiction. It is the intent of the City to determine fines as a reasonable estimate of the damages suffered by the City and/or its Subscribers, whether actual or potential, and may include without limitation, increased costs of administration and other damages difficult to measure.

PEG

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, that channel capacity be designated for public, educational, or governmental use, channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.¹⁵

¹⁵ See 47 U.S.C. § 531(b).

Accordingly, LFAs have the right to establish franchise requirements regarding channel capacity for government and education access programming. Furthermore, an LFA may require assurances that the cable provider will provide adequate educational and government access channel capacity, facilities, and financial support.

The City requires the cable operator to provide capacity for public, educational, and/or governmental ("PEG") access channels on the cable system. As set forth in Section 17 of the Franchise Agreement, the cable operator is obligated to provide to the City of Cape Coral a maximum of two channels for the exclusive use of the City for government access use. The City has currently reached the programming levels required on the first channel to trigger the obligation for the second channel. Furthermore, the Franchisee provides transmission capability to transmit programming to all subscribers from both City Hall and the Emergency Operation Center.

Emergency communications are critical to all local governments, however, the City of Cape Coral is located on the hurricane prone Gulf Coast of Florida which makes the need for such communication capability even more critical. The City has been in the path of numerous storms and hurricanes during which it must communicate with its residents, including those in evacuation areas. Absent this ability for the City to communicate, lives could be lost.

In support of the City's cable channels, the Cable operator provided the City with a capital grant in the amount of \$150,000, without which the City might not have had the resources to purchase the equipment necessary to produce the programming it currently delivers to its residents.

Service to Public Buildings and to Schools

The City's Franchise contains the following requirements:

Service to Public Buildings: The Franchisee agrees to provide Cable Service, without charge, to all City governmental buildings and any such buildings as may be constructed during the term of the Agreement in accordance with Section 13(5)(b) of the Ordinance. Such service shall include the Basic Cable Service tier, including any additional programming added to that level of service.

Service to Schools:

1. Franchisee shall, upon request, provide at least one cable television service outlet and when technically feasible and available in the area, at least one standard installation connection to a cable on-line service to each public elementary and secondary school within its franchise area that is passed by its cable system, and shall provide Basic Cable Service and cable on-line service to those installations at no cost to the City or school involved, and shall charge no more than its time and material costs for any additional cable service outlets (including cable on-line service) to such facilities.

2. Any school connected pursuant to subparagraph 1 above may elect to install its own internal wiring (provided such wiring meets required technical specifications) and to bear the cost thereof. Basic Service shall be provided to each outlet in all connected schools, at no cost to the City or school involved.
3. If provided elsewhere, Franchisee shall provide a free education program listing to each connected school. Such educational program listing will identify and describe programming on Franchisee's system that is appropriate for use in the classroom and will provide suggested curriculum support ideas.
4. If provided elsewhere, Franchisee shall provide to each connected school materials for teachers that explain the educational applications of Franchisee's broadband cable systems and services. If provided, the materials will be provided to all connected schools.
5. Nothing herein shall preclude Franchisee from providing benefits to schools which exceed those provided herein.

Build Out

Build out requirements ensure that there is a simple, objective, easily administered test of economic feasibility as to where cable service has to be available. Having a clear test helps to ensure that the cable company's facilities are extended into all neighborhoods meeting this test and that service is offered to all residents in such neighborhoods, regardless of race, age, income or other extraneous factors.

Since the test must be locally tailored so as to take into account local geography, demographics, and other factors which affect population density and ability to provide service, a test applied statewide or nationally would be ineffective. Since the rights of way are public property, maintained using public funds, the rights of way cannot be used in a discriminatory fashion. It is the City's responsibility to ensure that public property is used to provide service wherever there is sufficient population density.

Finally, the City has a duty to ensure that modern communications services are offered broadly to as large a number of the residents of the City as reasonably possible, without regard to age, race, and income or other improper service criteria.

The City's Franchise provisions were negotiated with the cable operator, taking into consideration the cable operator's business needs, engineering and construction requirements and the need to provide access to service on a non-discriminatory basis.

State-of-the Art

Given the rapid pace with which technology is advancing, the City recognized that it could not adequately predict the specific capacity or services that would be required to maintain a state of the art system in the City. However, like other communities, the City of Cape Coral recognized that a state of the art cable system is crucial to its economic and social development. Accordingly, the Ordinance and the Franchise require the cable provider to maintain a state of the art system in the City and provides for reporting requirements and enforcement mechanisms. Consistent with federal law, the City does not require the deployment of any specific technology, it does however require that cable systems in the City comply with the following definition as set forth in the Ordinance:

“State of the Art” means that level of cable system technical performance, capacity, equipment, components and service (without reference to the content of service) equal to that which has been developed and demonstrated to be generally acceptable and used by the Franchisee, its parents, affiliates or subsidiaries in systems of comparable size based upon number of subscribers, excluding Tests, and which is technically and commercially feasible in the Franchisee’s system.

Insurance and Security/Bonding Requirements

The City has a duty to protect its residents by ensuring that obligations are met and injured members of the community are compensated if the provider should encounter financial difficulties or file for bankruptcy. The City’s Franchise agreement contains the following insurance and bonding requirements:

- \$250,000 for property damage in any one accident;
- \$500,000 for personal bodily injury to any one person; and
- \$1,000,000 for personal bodily injury in any one accident;
- The Franchisee shall provide proof to the City of compliance with this Section no later than sixty (60) days from the date of the Commission resolution approving the grant of the Franchise. Failure to provide the City with proof of insurance within the prescribed time period will be a violation of this Franchise Agreement and subject Franchisee to penalties consistent with this Franchise and the Ordinance
- Franchisee shall, at its sole cost and expense, indemnify, hold harmless, and defend the City, its elected or appointed officials, employees, committees and boards, against any and all claims, suits, costs, losses, damages, expenditures causes of action, proceedings, judgments for equitable relief, and costs and expenses in accordance with Section 10(E) of Ordinance 90-00 of the City

Security fund: Pursuant to Section 11 of Ordinance 90-00, the Franchisee shall establish and maintain a security fund with the City in an amount of Fifty Thousand Dollars (\$50,000.00), in the form of a cash deposit, performance bond, or letter of credit.

Franchise Fees

With respect to payments by a franchisee, the Cable Act permits LFAs to collect up to 5% of gross revenues from cable providers as compensation for the use of public rights-of-way. However, in 2001, the State of Florida adopted the Florida Communications Services Tax (“CST”) Simplification Act, which superseded and preempted the authority of municipalities and counties in Florida to directly levy or collect cable television franchise fees.¹⁶

Under the CST, providers of cable, telephone and other communications services remit the communications tax directly to the Florida Department of Revenue, which takes an administrative fee and remits the balance to the respective LFAs. Rates were established by the State for each taxing jurisdiction based upon historical revenues under prior franchise fee and taxing schemes with the intent that the jurisdictions would not receive net returns significantly different than they received collectively from the prior distinct funding sources.

Enforcement Mechanisms

In addition to the fines specifically set forth for violations of customer service standards and any other remedies available at law or equity, the Ordinance provides remedies and procedures for enforcement of each and every provision of the Ordinance and Franchise.

The ability at the local level to enforce franchise obligations is critical. For example, the City has recently served the cable operator with notice that pursuant to its obligations under the Franchise, the operator is obligated to provide a second government access channel to the City. Notwithstanding the fact that the City has satisfied its programming obligations under the Franchise, the operator has not yet come into compliance. Should the operator fail to provide the second channel within the timeframe required by the Franchise, the City may impose liquidated damages in the amount of \$350.00 per day for each day that the violation continues.

As previously stated, neither the State nor the Commission has the staff or the budget to respond to violations in a timely manner. In reality, City Hall gets the telephone calls from the local residents, not the FCC. The City needs and expects a timely response to ensure local service issues are handled in a timely manner.

Responses/Comments to the Notice of Proposed Rulemaking

The Commission does not have the legal authority to issue rules which preempt LFAs authority.

Providers seeking to provide multichannel video service over upgraded local wireline networks have alleged that the local franchising process serves as a barrier to entry. Accordingly, the FCC seeks comment on how it should implement 47 U.S.C. § 541(a)(1), which provides that a franchising authority may not unreasonably refuse to award an additional

¹⁶ See Fla. Stat. §§ 202.13(3), 202.20(2)(b)(1)(b), and § 202.24(1).

competitive franchise. The City respectfully asserts that the Commission should not adopt rules which would preempt its duly-adopted Cable Television Ordinance, since to do so would conflict with Congress' intent and exceed the Commission's Congressionally-delegated authority. Any proposed Commission rule would interfere with the City's Congressionally-granted authority. The Cable Act states, in relevant part:

Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter [nor] to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.¹⁷

It was the intent of the Cable Act to “preserve the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects... [and that] the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs.”¹⁸ Moreover, Congress provided that where LFAs treated franchisees unreasonably, franchisees had the right to seek judicial relief.¹⁹ Congress did not authorize the Commission to make rules preempting local laws which are not inconsistent with the Act, nor inserting itself into the local franchise negotiation process. Thus, any proposed Commission rule which would circumvent this process would be counter to Congress' express intent that franchising take place at the local level and that any unreasonable denials are reviewed by the judiciary.

The local franchising process is not unreasonably causing refusals of competitive franchise grants.

New providers, including Verizon AT&T and SBC are seeking to provide multichannel video service over upgraded local wireline networks so that they can offer a competitive “triple play” (voice, Internet and video) to cable operators' triple play. These providers want to circumvent the Cable Act's local cable franchising process via federal and state legislation and via Commission rules as reflected in this NPRM.

In Florida, these new providers, as telephone companies, have the legal right and ability to deploy an advanced network.²⁰ However, in order to offer the video component, LFAs require a franchise agreement. In fact, a number of years ago, BellSouth had obtained a number of cable franchises which the company failed to build. Therefore, BellSouth never offered cable service even though they held a number of cable franchises.

For example, Verizon has stated that it will deliver its FiOS television service by constructing the system primarily as a telephone system, not subject to cable television franchise authority. Verizon argues that it may begin FTTP system construction at will, even in

¹⁷ See 47 U.S.C. § 556(a)&(b).

¹⁸ See NPRM at n. 18, citing, H.R. Rep. No. 98-934 (1984).

¹⁹ See 47 U.S.C. § 555(a).

²⁰ See Fla. Stat. §337.401.

communities where it is not actively seeking a cable television franchise, because the system will be used to provide voice and data services, which is not regulated by cable television ordinances, regardless of a cable franchise. Therefore, Verizon has been deploying its FTTP network without having yet obtained video franchises from many of the LFAs in the communities in which they are building. In those communities, it can market and use this network to bring its phone and high-speed data products to consumers, and include its wireless product in the bundle. Its video product can join that bundle as Verizon obtains franchise agreements, but there is no legal impediment to construct and begin deriving income from its advanced system while it negotiates video franchise agreements with LFAs.

Thus, these new providers, as telephone companies have an advantage over cable providers since the telephone companies have independent right of way authority and may begin construction or upgrade their facilities without LFA regulation. However, cable operators are not permitted to begin system construction until the franchise agreement is negotiated and finalized.

Build-Out Requirements and Red-Lining

Build out requirements encourage competition and prevent red-lining of communities since these requirements prevent profit optimization by denying new providers the ability to select areas where high-margin customers may reside. LFAs have a congressionally-mandated duty to manage the rights of way to ensure certain members of the community are not denied access to service due to their race or income levels. Accordingly, a Commission rule preventing LFAs from imposing build-out requirements could perpetuate redlining.

The City of Cape Coral is one of the fastest growing Cities in the country and includes a significant minority population. Accordingly, the requirements for build out incorporated in Section 15 and the prohibition against discrimination set forth in Section 15-20 as well as the City's ability to enforce these obligations through the imposition of fines or liquidated damages are essential.²¹

The City's response to Verizon's arguments

Verizon has stated that the local franchising process takes too long due to inertia, arcane application procedures, bureaucracy or inattentiveness by LFAs arguing that it would have to negotiate with 10,000 LFAs in order to offer video service in its current service area. However, entrants, such as Verizon, with multi-use systems have two other options to offer video service without obtaining a franchise from LFAs: satellite and OVS. Furthermore, in the case of obtaining a franchising agreement for use of the rights of way, in Florida, Verizon will be able to reach a significant number of the population by dealing with a relative few LFAs with jurisdiction over the State's various areas of dense population.

²¹ See letter from Councilman Rosado

Verizon also argues that that local franchising requirements can result in “outrageous demands by some LFAs” wholly unrelated to video services or franchising rationale. However, it is evident that the City’s franchising process, with Adelphia illustrates that the parties were able to negotiate in good faith over the exact levels of support to be provided to the City and part of that process was the City’s willingness to set forth its justifications for the requests being made.

Elected officials hear from all interested parties, and make a balanced judgment as to what level of support will be required, taking into account the LFA’s future cable-related community needs and the provider’s ability to make a reasonable profit on its investment in the community.

Conclusion

The City disagrees with the Commission’s tentative conclusion that the FCC has the authority to ensure that LFAs not “unreasonably refuse” to award competitive franchises. Congress did not grant the Commission jurisdiction to directly implement §541(a)(1). Accordingly, the Commission does not have enforcement authority since this is a function of the federal judiciary.

As to whether the Commission should address actions at the state level if they are deemed to be unreasonable barriers to entry, the City opposes any such state legislation. There are adequate judicial remedies to redress any unreasonable barriers to entry. The Commission has no authority to preempt state statutes as the NPRM suggested.

Finally, the City agrees with the Commission’s tentative conclusion, that it is not unreasonable for an LFA, in awarding a franchise, 1) to assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides; 2) allow a cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area, and 3) require adequate assurance that the cable operator will provide adequate access channel capacity, facilities, or financial support.

The City is concerned that its authority as an LFA not be decreased, either by FCC rule or by the Florida Legislature. Local cable franchising ensures that local cable operators are allowed access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner in accordance with local requirements. Local cable franchising also ensures that the City’s specific needs are met and that local customers are protected.

In light of the foregoing, the City respectfully requests that the Commission does not interfere with local government authority over franchising or otherwise impair the operation of the local franchising process as set forth under existing federal law with regard to either existing

cable service providers or new entrants. The Commission should not permit providers to simply circumvent the local franchising process.

Respectfully submitted this 10th day of February, 2006

The City of Cape Coral, Florida

A handwritten signature in black ink, appearing to read "Eleni C. Pantaridis", with a long horizontal flourish extending to the right.

By: Counsel for the City of Cape Coral, FL
Ila L. Feld & Eleni Pantaridis
Leibowitz & Associates, P.A.
One S.E. Third Avenue, Ste. 1450
Miami, FL 33131

cc: Dolores Menendez, City of Cape Coral, FL, dmenende@capecoral.net
NATOA, info@natoa.org
John Norton, John.Norton@fcc.gov
Andrew Long, Andrew.Long@fcc.gov